INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	13
Appendix	14

CITATIONS

Cases:	
Behrens, In re, 39 F. (2d) 561	6, 11
Commercial Inv. Trust Corp., In re, 31 F. (2d) 494	7
Dunn v. *Ickes*, 115 F. (2d) 36, certiorari denied, 311 U. S. 698	9
Fisburn v. *Jackson*, 55 F. (2d) 934	7
Goldman v. *American Dealers Service, Inc.*, 135 F. (2d) 398	6, 11
Hammond v. *Hull*, 131 F. (2d) 23, certiorari denied, 318 U. S. 777	9
McGuire v. *Winslow*, 26 Fed. 304	7
Milkint v. *Morgenthau*, 92 F. (2d) 266	7, 12
No. 32 East Sixty-Seventh Street, In re, 96 F. (2d) 153	6
The Brig "Ann," 9 Cranch 289	7
United States v. *Chicelli*, 10 F. Supp. 900	7
United States v. *Crusell*, 81 U. S. 1	9
United States v. *Specified Quantities of Intoxicating Liquors*, 7 F. (2d) 835	9
Statutes involved:	
Internal Revenue Code:	
Section 3723 (26 U. S. C. 3723)	5, 14
Section 3724 (26 U. S. C. 3724)	5, 7
Section 3724 (a)	8, 14
Section 3724 (b)	9, 14
Section 3724 (c)	5, 7, 9, 14
Section 3724 (d)	7, 14
Revised Statutes, Section 934 (28 U. S. C. 747)	6, 10, 16
40 U. S. C. 304h (Act of Aug. 27, 1935, c. 740, sec. 303, 49 Stat. 879)	17

613238—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 420

CHARLES COLACICCO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 32–34) is reported at 143 F. (2d) 410. The opinion of the district court (R. 14–20) is reported at 55 F. Supp. 766.

JURISDICTION

The judgment of the circuit court of appeals was entered June 5, 1944 (R. 35–36). The petition for a writ of certiorari was filed September 1, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The district court dismissed a petition to vacate an administrative forfeiture under Section 3724 of the Internal Revenue Code on the ground that, since the forfeiture was effected in conformity with law, it had no jurisdiction. On appeal the order was affirmed as against the contention that Section 3724 is unconstitutional. Petitioner contends that the circuit court of appeals held that the district court did have jurisdiction over the res and that the circuit court of appeals affirmed the order on the assumption that the administrative proceedings were regular, thus basing its decision on facts outside the record. The question presented is whether the opinion of the circuit court of appeals is susceptible of the construction contended for by petitioner and, hence, whether the case should be remanded to the circuit court of appeals to take the steps necessary to a determination of the issues concerning the regularity of the administrative forfeiture.

STATUTES INVOLVED

The applicable statutory provisions are set forth in the Appendix, *infra,* pp. 14–17.

STATEMENT

On or about May 11, 1943, petitioner filed in the District Court for the Southern District of New York a petition seeking an order vacating the seizure and subsequent forfeiture of his automobile by the Treasury Department and directing

its return to petitioner (R. 4–7). The petition was brought on for hearing upon a notice of motion addressed to the United States Attorney (R. 3–4). The petition alleged that the seizure had been made on June 1, 1942, because it had been claimed that the automobile had been used for the transportation of fuel oil in furtherance of a violation of the Internal Revenue Laws[1] (R. 5); that the automobile had been subsequently appraised, at the instance of the Treasury Department, at $475 and was administratively forfeited because no claim and cost bond had been filed by petitioner within the period of time claimed by the Treasury Department to be the limit for such filing in cases where the value of the seized property is $500 or less (R. 5); that the automobile was not sold at public auction as required under Section 3724 (d) of the Internal Revenue Code, but was retained for official use by the Alcohol Tax Unit (R. 5); that petitioner's applications to the Treasury Department for remission of the forfeiture were denied and the Department refused to accept a cost bond tendered by petitioner because the Department ruled that no satisfactory showing for relief had been made and that the claim and cost bond had not been filed within the statutory period (R. 5–6). The petition further alleged that the automobile had not been used in violation of the Internal Revenue Laws; that its value when seized

[1] The oil was apparently used in connection with the operation of an illicit still (R. 15).

was more than $500 and the appraisal at a lesser value was erroneous; that the administrative forfeiture was not in accordance with law and deprived petitioner of his right to a judicial determination of whether the automobile had been used in violation of law, thus resulting in the taking of property without due process (R. 6–7).

The United States Attorney appeared in opposition to the petition, and after hearing counsel, the district court directed that a hearing be had for presentation and determination of the questions of fact and law presented (R. 8–9). At the hearing both the United States Attorney and petitioner introduced evidence (R. 23), the only portion of which appearing in the record is the testimony of one of the government appraisers as to the valuation of the automobile (R. 10–13). On October 18, 1943, the district court rendered an opinion dismissing the petition (R. 14–20), and thereafter entered an order of dismissal based on the ground that it had no jurisdiction to vacate the seizure of the automobile and direct its return (R. 23–24). The order also denied petitioner's motion for rehearing and reconsideration, in which he requested as alternative relief that the United States Attorney be directed to proceed with the filing of a libel or to abandon the seizure and return the automobile to petitioner (R. 21–22). On appeal to the circuit court of appeals the order of the district court was affirmed (R.

35–36). The circuit court of appeals stated that the only question presented on the appeal was whether it was a denial of due process of law to the owner of property appraised at less than $500 to require the bond specified in Section 3724 (c) (Appendix, *infra,* p. 15) where he is able to post one (R. 33), and held that the requirement did not make the section unconstitutional (R. 33–34).

ARGUMENT

The gist of petitioner's argument, as we understand it, is as follows: Before the district court the issues were (1) whether the automobile had been used in violation of law so as to justify its seizure, (2) whether there had been compliance with the provisions of Sections 3723 and 3724 of the Internal Revenue Code so as to validate the forfeiture, and (3) whether petitioner's failure to file a claim to the automobile and post a bond, as required by Section 3724 (b) and (c), precluded the court from taking jurisdiction of the instant proceeding (Pet. 19). The dismissal by the district court was predicated solely upon lack of jurisdiction (Pet. 18, 19). Its conclusions with respect to the legality of the seizure and compliance with the provisions of Section 3724 did not relate to the issue of jurisdiction and, hence, were *obiter dicta* (Pet. 20). On appeal petitioner's argument was directed only to the jurisdictional question (Pet. 20–21). The circuit court of appeals, however, held that the district court

did have jurisdiction under 28 U. S. C. 747 (Appendix, *infra,* pp. 16–17), and thus threw open for determination the issues as to the regularity of the forfeiture (Pet. 21). Since there was no evidence in the record upon which these issues could be resolved (Pet. 21), the circuit court of appeals erred in affirming the order dismissing the cause for lack of jurisdiction and in failing to direct that the necessary evidence be introduced (Pet. 21–22).

The argument is unsound because it is founded upon petitioner's misconception of the nature of the proceedings in the district court and the basis for the dismissal by that court, and his misconstruction of the opinion of the circuit court of appeals.

Petitioner apparently bases his contention that the district court had jurisdiction on those cases which have held that by virtue of the provisions of 28 U. S. C. 747 (Appendix, *infra,* pp. 16–17), the property is in *custodia legis* from the time of the seizure, and that the owner thereof may move in the district court to compel the custodian of the property to institute forfeiture proceedings; if he fails to proceed within the time set, he must return the goods (*Goldman* v. *American Dealers Service, Inc.,* 135 F. (2d) 398, 401 (C. C. A. 2); *In re No. 32 East Sixty-Seventh Street,* 96 F. (2d) 153, 156 (C. C. A. 2); *In re Behrens,* 39 F. (2d) 561 (C. C. A. 2)). However, where the appraised value of the seized

property is less than $500, the proceedings for forfeiture are controlled by Section 3724 (Appendix *infra*, pp. 14–16), and the method there prescribed is exclusive (*Milkint* v. *Morgenthau*, 92 F. (2d) 266 (C. C. A. 4); *Fisburn* v. *Jackson*, 55 F. (2d) 934, 936 (N. D. Tex.); *United States* v. *Chicelli*, 10 F. Supp. 900 (W. D. N. Y.)). That method of procedure is administrative; but if a claimant of the seized property files the bond specified in Section 3724 (c), the proceeding for forfeiture is in the "ordinary manner prescribed by law." When an administrative forfeiture of property pursuant to Section 3724 is complete, it is in legal effect and operation equivalent to a sale under a judicial decree. Cf. *In re Commercial Inv. Trust Corp.*, 31 F. (2d) 494, 495 (W. D. N. Y.); *McGuire* v. *Winslow*, 26 Fed. 304, 307 (N. D. N. Y.).

Since it is fundamental that, before there can be a judicial proceeding in rem, there must be a res to proceed against (*The Brig "Ann,"* 9 Cranch 289), the basic issue before the district court was whether the proceedings taken under Section 3724 to forfeit petitioner's property had effectively transferred title to the automobile and thus removed the res from the jurisdiction of the court.

Petitioner sought relief in the district court on the alleged grounds that the automobile had not been sold at public auction as required under Section 3724 (d); that it had not been used in viola-

tion of law; that the appraisal of its value at less than $500 was erroneous; and that the administrative forfeiture was not in accordance with law (R. 5–7). These were the subjects of the district court's opinion. As to petitioner's first contention, which apparently he did not strongly press, the court pointed out that the disposition of the automobile had been made "by assignment of its use for governmental purposes in accordance with the provisions of Title 40, U. S. C. A., Sec. 304h" (Appendix, *infra*, p. 17) (R. 18). As to the contention that the automobile had not been used in violation of law, the court said that the question of petitioner's "guilt or innocence is not the subject matter of this proceeding, but there was reasonable probable cause for the Alcohol Tax Unit of the Treasury Department to have seized the automobile" (R. 19). The court also held that the correctness of the appraisal could not be the basis for judicial review since "the intent of the statute must be considered as a guide and protection to the Collector; he could not very well base his action on a speculative value when the Congress provided for two distinct methods of procedure" (R. 18). Having already found that the appraisal required by Section 3724 (a) had been made and the appraisers had determined the value of the automobile to be $475 (R. 16), the court stated that the proceedings taken after the seizure "appear to have been regular" (R. 19); that pre-

sumptively the notice required by Section 3724 (b) had been published (R. 16); that petitioner did not make any claim or file the bond required by Section 3724 (c) (R. 17); and that his application for remission of the forfeiture had been denied by the Treasury Department (R. 17). There is nothing to indicate that petitioner attacked the forfeiture on the ground that the required notice had not been published. Accordingly, the district court properly assumed that the required notice had been published. Cf. *United States* v. *Crusell,* 81 U. S. 1; *Hammond* v. *Hull,* 131 F. (2d) 23, 25 (App. D. C.), certiorari denied, 318 U. S. 777; *Dunn* v. *Ickes,* 115 F. (2d) 36, 37 (App. D. C.), certiorari denied, 311 U. S. 698.[2]

The balance of the opinion after the statement that the proceedings were regular, is devoted to a discussion of the case of *United States* v. *Specified Quantities of Intoxicating Liquors,* 7 F. (2d) 835 (C. C. A. 2), upon which petitioner relied (R. 19). The court explained that the case was not applicable because there "the court had jurisdiction of the subject matter and of the public official who, presumptively, at least, had possession of and could be directed to return the subject of the seizure" (R. 20), whereas "In this proceeding the Court has no jurisdiction over the officers who

[2] We are advised by the Treasury Department that in fact a notice had been published in the Newburgh (New York) News on June 16, 23, and 30, 1942.

made the seizure, or the party who now concededly has the possession of the automobile, nor the property itself, and therefore could not direct the return thereof. Cf. *Goldman* v. *American Dealers Service, Inc.,* 49 F. Supp. 993, aff'd, 135 Fed. (2d) 398" (R. 20). As characterized by the circuit court of appeals, the district court dismissed the petition because "the forfeiture was within the terms of the statute" (R. 33). Clearly, the conclusions of the district court bearing on the legality of the seizure and compliance with the provisions of Section 3724 were not, as contended by petitioner, *obiter dicta.* The court found that petitioner had not sustained his contentions and that the administrative proceedings had effectively removed the res from the court's jurisdiction.

As appears from the designation of his Points on Appeal (R. 28–29, Pet. 6–7), petitioner predicated his appeal to the circuit court of appeals on the contention that if Section 3724 precluded the district court from taking jurisdiction it was unconstitutional. Petitioner's theory was that the filing of a bond could not constitutionally be a prerequisite to the court's jurisdiction of the forfeiture proceedings and therefore the property was still in *custodia legis* under 28 U. S. C. 747.[3]

[3] At page 4 of his brief in the circuit court of appeals, a copy of which has been lodged with the Clerk, petitioner stated, in referring to the dismissal by the district court upon the ground of lack of jurisdiction:

"The opinion of the District Court makes it clear that the merits were not considered, since the decision, dismissing the

Since petitioner did not argue that the forfeiture proceedings were invalid in other respects, the circuit court of appeals was clearly justified in stating that petitioner "raises no question as to the legality of the seizure, or that the car was assigned to government use after its forfeiture, instead of being sold" (R. 32), and that the only question was whether "§ 3724 (c) of Title 26 is unconstitutional in requiring him to post a bond in the sum of $250 to secure the costs and expenses of any proceedings to condemn the car, as a con-

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petition and denying the motion for a rehearing, rested upon the finding that the Court had no jurisdiction.

"Although the opinion does not point out why in the instant case the relief was denied, the reason can only be that an administrative forfeiture had already taken place herein under the aforementioned section of the Internal Revenue Code [Section 3724]. The only theory upon which such a conclusion can rest is that the Court believed that the administrative forfeiture was exclusive and precluded the District Court from taking jurisdiction and compelling the filing of a libel because petitioner did not file the $250 cost bond which the said section seems to make a prerequisite to commencing proceedings to libel the property seized without the direction of a Court.

"The question then presented to this Court is whether the said Internal Revenue Code section is exclusive and precludes this Court from taking jurisdiction where the cost bond is not filed."

He argued that he was entitled to the relief granted in *In re Behrens*, 39 F. (2d) 561 (C. C. A. 2), and *Goldman* v. *American Dealers Service, Inc.*, 135 F. (2d) 398 (C. C. A. 2), "unless, of course, it is held that Section 3724 of the I. R. C. is constitutional and that it precludes the District Court from taking jurisdiction" (p. 11).

dition upon his right to contest the propriety of the seizure" (R. 32–33).[4]

Hence, when the circuit court of appeals decided that the requirement for the posting of a bond is constitutional, it disposed of the only ground urged by petitioner as the basis for jurisdiction in the district court, and therefore held that the district court did not have jurisdiction. There is thus no warrant for petitioner's contention (Pet. 19, 21) that the circuit court of appeals decided that the district court did have jurisdiction, and no warrant for his assertion that the circuit court of appeals based its decision on facts outside the record.

In essence, petitioner's complaint is that he was deprived of a judicial determination of the issue whether his automobile was subject to be forfeited. However, since he did not avail himself of the remedy provided by the statute whereby he could have secured such a determination and has made no showing that he was unable to post the required bond, he has no standing now to contest the validity of the completed forfeiture (*Milkint* v. *Morgenthau,* 92 F. (2d) 266, 267 (C. C. A. 4), and cases cited).

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[4] Incidental to his argument on the constitutionality of the statute, petitioner did mention his contention that the appraisal was erroneous, but he did not argue the point.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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